Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 28, 1993

Ms. Lavergne Schwender
Assistant County Attorney
Harris County
1001 Preston, Suite 634
Houston, Texas 77002-1891

OR93-344

Dear Ms. Schwender:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 19617.

Harris County (the "county"), through its purchasing agent, has received a request for information relating to certain county prescription drug bids. Specifically, the requestor seeks information regarding:

Administration Fees/Pricing
Participating Pharmacy Network
Reimbursement to the pharmacies
Details of the managed care options being offered
Reporting capabilities
Systems capability
Formulary Guarantees
Claims submission process

The requestor seeks this information as it relates to the following vendors: Baxter, Diversified Pharmaceutical Services-Thrift, Insurx, Inc., and Cigna/Medco. You advise us that proposals submitted by these companies in response to a request for proposals are responsive to the request. You have submitted these proposals to us for review and claim that some of the information contained in them is excepted from required public disclosure by section 3(a)(4) of the Open Records Act.

Pursuant to section 7(c) of the Open Records Act, we have notified the companies whose interests may be affected by disclosure of the information submitted to us for review. In response, we have received letters from Diversified Pharmaceutical

Services ("DPS")[1], Thrift Drug, Inc. ("Thrift Drug"), Caremark Inc., Prescription Service Division ("Caremark")[2], and Insurx, Inc. ("Insurx"), in which they contend that the requested information is protected from required public disclosure by either sections 3(a)(1), 3(a)(4) or 3(a)(10) of the Open Records Act. We did not, however, receive a response from CIGNA. Because we have no basis on which to withhold the information under section 3(a)(10), the information concerning this company may not be withheld from required public disclosure under section 3(a)(10). *See, e.g.*, Open Records Decision Nos. 405, 402 (1983).

We turn first to section 3(a)(4). Section 3(a)(4) excepts from required public disclosure "information which, if released, would give advantage to competitors or bidders." The purpose of section 3(a)(4) is to protect governmental interests in commercial transactions and is no longer applicable when the bidding on a contract has been completed and the contract is in effect. Open Records Decision No. 541 (1990). You advise us that the contract has been awarded and that the competitive bidding process at issue here has been concluded. Accordingly, section 3(a)(4) is no longer applicable.

We turn next to section 3(a)(10). Section 3(a)(10) protects the property interests of private persons by excepting from required public disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. Commercial or financial information is excepted under section 3(a)(10) only if it is privileged or confidential under the common or statutory law of Texas. Open Records Decision No. 592 (1991) at 9.

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2. Section 757 provides that a trade secret is

> any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply

[1]DPS and Express Pharmacy Services, Thrift Drug, Inc.'s mail services operation, jointly submitted a proposal for prescription drug benefit managment services to the county. Both DPS and Thrift Drug have submitted arguments in which they seek exception to required public disclosure of portions of their joint proposal.

[2]Caremark is successor in interest to Baxter Healthcare Corporation.

> information as to single or ephemeral events in the conduct of the business, . . . [but] a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939).

This office has previously held that if a governmental body takes no position with regard to the application of the "trade secrets" branch of section 3(a)(10) to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6.[3]

DPS claims that portions of the "EPS/DPS An Integrated Prescription Drug Plan for Harris County" proposal are excepted from required public disclosure as trade secrets under section 3(a)(10). Specifically, DPS seeks trade secret protection for the following information:

> 1. DPS network pricing, administrative fees and participant material fees. (Items 10 and 11 in Introductory Paragraph; Item 20 in General Information Questionnaire Section; and other miscellaneous sections of Bid).
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> 2. 90 day task schedule (Exhibit D).
>
> 3. Tape format specifications for eligibility transfer (Exhibit E).

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[3]The six factors that the Restatement gives as indicia of whether information constitues a trade secret are

> (1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS, *supra*; *see also* Open Records Decision Nos. 319, 306 (1982); 255 (1980).

4. Lag reports showing development of claim liabilities by date incurred and date of payment, i.e. reports PH 5136-01 and PH 5136-03 (Exhibit F), Example Drug Utilization Review reports, i.e. reports PH 7535-01 and PH 7539-01 (Exhibit F), Sample ad hoc reports and management reports (Exhibit F).

5. Flow chart of claims adjudication and claims payment process (Exhibit J).

6. Complete list of system edits (Exhibit K).

7. List of medical conditions used to determine pre-existing conditions (Exhibit M).

8. Examples of statistical claims reports, i.e. checkwrite reports 6020-02 and 6040-03 (Exhibit N), sample enrollment report PH 300 (Exhibit N).

9. Service and Performance guidelines (Exhibit O).

10. In addition to being included in the Exhibits listed above, the information described in items 1 through 9 above is also found in the introductory paragraphs of the Bid, the General Items Information Questionnaire, Management Reports Questionnaire, Managed Prescription Drug Care Program Questionnaire, Claims Questionnaire, and the Performance Guarantees sections of the Bid.

DPS advises us that this information constitutes "part of the services and capabilities that DPS sells; that the information is not readily accessible nor generally known outside DPS; and that DPS "takes precautions and measures to protect the information from being disclosed to individuals inside and outside of DPS." For example, DPS advises us that it shares the abovementioned information with third parties only pursuant to confidentiality agreements and tracks third parties and DPS employees who have been privy to the information. In addition, DPS advises us the abovementioned information took years to develop and that disclosure of the information to competitors would undercut its competitive advantage. We conclude on the basis of the foregoing that DPS has made a *prima facie* case establishing that the categories of information described above constitute trade secrets within the meaning of section 3(a)(10) and thus may be withheld from required public disclosure. DPS, however, has not made a *prima facie* case for the remaining information in its proposal, including the following:

11. Retail dispensing locations (Exhibit H).

12. Claims processing organization chart (Exhibit L), and list of personnel and their duties in relation to DPS' claims department in item 22 on Bid page 46.

13. Item 17 in the Claims Questionnaire regarding claims cost control techniques.

14. Item 30 in the Claims Questionnaire regarding DPS' DUR and DUE programs.

15. Item 32 in Claims Questionnaire regarding methods and procedures used to provide savings under DPS' prescription drug benefit management program.

Nor has DPS demonstrated that this information is privileged or confidential under the common or statutory law of Texas. Accordingly, this information may not be withheld under section 3(a)(10) and must be released.

Thrift Drug contends that portions of the "EPS/DPS An Integrated Prescription Drug Plan for Harris County" proposal are excepted from required public disclosure as trade secrets under section 3(a)(10). Specifically, Thrift Drug seeks trade secret protection for the following information:

1. Proposal Item 8.

2. Proposal Item 9.

3. General Information Questionnaire, question number 20.

4. Managed Prescription Drug Care Program Questionnaire, question number 7.

Thrift Drug advises us as follows:

> The information we seek to protect is not public knowledge. Access to this information is limited to a small number of EPS employees that deal specifically with this aspect of EPS's business. Thus the information is not readily accessible to the public and furthermore is restricted in regard to EPS employees. Because of the value of this information and the effort put forth by EPS employees in developing the Bid, EPS has taken great measures to ensure that this information is known to be confidential . . . by adding a confidentiality agreement.

On the basis of Thrift Drug's arguments, we conclude that Thrift Drug has made a *prima facie* case establishing that the four categories of information set forth above constitute trade secrets. Accordingly, this information may be withheld from required public disclosure under section 3(a)(10) of the Open Records Act. The remaining information in the EPS/DPS proposal, except as noted above, must be released.

Caremark objects to release of the following information:

> SECTION II, Page 37 only (Titled "Managed Plan" and stamped "Confidential").
>
> SECTION III, In its entirety (Pages 1-12 and unnumbered paged titled "HARRIS COUNT MANAGED PLAN SAVINGS SUMMARY").

Caremark advises us that this information is known within the company only by employees "with a need to know" and outside the company only by those who have contracted to obtain Caremark's services or groups to which Caremark has directed its marketing. Caremark also advises us that it takes "extensive measures" to guard the secrecy of this information, including the inclusion of a confidentiality clause in contracts it concludes with clients restricting disclosure of the information. Groups to which Caremark directs its marketing are made aware of the confidential and proprietary nature of the information they receive. Finally, Caremark advises us that the information has required over three years to develop at a cost of several million dollars and would be difficult for competitors to duplicate. On the basis of the foregoing, we conclude that Caremark has made a *prima facie* case establishing that the information constitutes trade secrets. Accordingly, this information may be withheld from required public disclosure under section 3(a)(10) of the Open Records Act. The remaining information in Caremark's proposal, however, must be released.

Finally, we consider Insurx's claim that the (1) customer lists; (2) unique pricing information; and (3) unique systems and report capabilities contained in its proposal constitute trade secrets and are thus excepted from required public disclosure by section 3(a)(10) of the Open Records Act. Insurx advises us that this information is provided only to employees who have demonstrated a need to know. Such employees are typically bound by confidentiality agreements that restrict the disclosure of such information to third parties. In addition, Insurx advises us that it takes substantial measures to secure the confidentiality of this information, that the information was developed over five to six years at a cost of millions of dollars, and that the information would be extremely difficult or impossible to duplicate. We conclude that Insurx has made a *prima facie* case establishing that the information constitutes trade secrets and is thus excepted from required public disclosure by section 3(a)(10) of the Open Records

Act. The remaining information contained in Insurx's proposal, however, must be released.[4]

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,

Loretta R. DeHay
Assistant Attorney General
Opinion Committee

LRD/GCK/lmm

Ref.: ID# 19617
ID# 20060
ID# 20104
ID# 20129
ID# 20130
ID# 20135
ID# 20178
ID# 20210
ID# 20216
ID# 20220
ID# 20266

cc: Mr. Jack McCown
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[4]Some of the respondents also assert that some of the requested information is excepted because its release would either 1) impair its ability to obtain the information in the future or 2) cause substantial harm to the competitive position of the person from whom the information was obtained, citing Open Records Decision Nos. 494 (1988) and 309 (1982). Past open records decisions issued by this office relied on federal cases ruling on exemption 4 of the federal Freedom of Information Act (FOIA) in applying section 3(a)(10) to commercial information. *See National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). However, in Open Records Decision No. 592 (1991), the logic of relying on federal interpretations of exemption 4 of FOIA was reexamined. As a consequence of this reexamination, open records decisions applying federal interpretations of exemption 4 to section 3(a)(10) of the Open Records Act were overruled.

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